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RAILWAY RATES AS PROTECTIVE TARIFFS

The most potent single factor leading to the adoption of the Federal Constitution was the desire to terminate the intolerable state of affairs brought about by the several colonies' practice of imposing customs barriers against one another—"mutually oppressing each other's industries." In the Constitution, accordingly, the several states conferred upon Congress the exclusive power to regulate interstate commerce. Under that grant of power, Congress passed the Act to Regulate Commerce, which established the Interstate Commerce Commission. It is an illustration of the irony of fate that the Interstate Commerce Commission in turn has sought to deny and destroy that freedom to trade over the entire area of the United States, and to re-establish the doctrine that each locality is entitled to the enjoyment of the advantages accruing to it by virtue of its location.

In James and Mayer Buggy Co. *vs.* The Cincinnati, New Orleans & Texas Pacific Railway Co., *et al.* (4 *I. C. R.*), the railways sought to justify the charging of a lower rate from Cincinnati to Augusta than from Cincinnati to Social Circle, an intermediate point, by saying that the presence of competition for the market at Augusta, and the absence thereof at Social Circle, caused the traffic of Cincinnati with Augusta and Social Circle respectively to be carried under dissimilar circumstances and conditions. At Baltimore and other seaboard cities there were large

manufactories of buggies and carriages which could deliver their products to Augusta at prices which the manufactories at Cincinnati could not meet, unless the railways leading from Cincinnati were allowed to make rates to Augusta that would be unremunerative if extended to Social Circle and other local points, for the trade of which the Baltimore manufacturers found it not worth while to compete actively. The commission said:

> Independent of the rate to shorter-distance points on their lines, defendants insist that they may lawfully make such lower rate to the longer-distance point as will prevent eastern manufacturers more advantageously located from taking the Augusta market from Cincinnati manufacturers. The right to make the lower charge for the longer distance is averred to be necessary to secure the transportation of carriages from Cincinnati, which, without the advantage of such lower charge, would come from the factories of eastern makers. . . . . If the contention of the defendants is justified by the statute, and they can avail themselves of its exceptional provision and charge more for the shorter distance for the purpose of equalizing commercial conditions and trade relations between the cities of Cincinnati and Baltimore in the Augusta market, the same thing may be done to place Cincinnati carriage-makers on an equal footing with those of Augusta in the Augusta market, or to relieve any city from any disadvantage in markets of other cities, or to deprive all cities or places of production of any advantage resulting from location. Such an interpretation would make the fourth section of the Act to Regulate Commerce practically inoperative, and with such a license in rate-making, carriers might give advantage to or build or destroy the carriage or other business of any city or locality.

The commission here speaks so unequivocally that its words require no comment or elucidation, beyond the statement that of course the liberty to enable a producer or trader, wherever located, to sell his wares in any market, wherever located, does not confer upon railways "the license to give advantage to or build or destroy the carriage or other business of any city or locality." Nor does the history of railway rates afford any ground for the fear that in this matter liberty will degenerate into license.

In E. M. Raworth *vs.* Northern Pacific Railroad Co., *et al.* (5 *I. C. R.*), the Interstate Commerce Commission said:

> The Atlantic seaboard sugar refined at New York has the advantage [over the Pacific coast sugar refined at San Francisco] at Missouri River points of the shorter haul, and the further fact is present that the trunk lines

over which it is transported are enabled by the greater amount of their traffic and for other reasons to charge lower rates on traffic in general than the transcontinental lines over which the Pacific coast sugar refined at San Francisco is transported [to Missouri River points]. On the other hand, the sugar refined at San Francisco has the advantage over that refined at New York when points some distance west of the Missouri River points are reached, and from thence on to the Pacific coast. In other words, each has the advantage in what may be termed its own natural territory. These natural commercial advantages resulting from *location* were intended to be maintained and promoted, and not destroyed or neutralized, by the "long and short haul" rule of the statute.

The tremendous weight which the Interstate Commerce Commission lays upon distance in the making of railway rates is further illustrated by its *obiter dicta* in Colorado Fuel and Iron Co. *vs.* Southern Pacific Co., *et al.* (6 *I. C. R.*). In that case the commission ordered that the rate on iron and steel shipped from Pueblo, Colo., to San Francisco, be made 75 per cent. of the rate from Chicago to San Francisco, because the distance from Pueblo to San Francisco was 60 per cent. of the distance from Chicago to San Francisco. The commission said:

> The offsetting of natural disadvantages of a business at one place as compared to a like business at another, by discrimination in freight charges, is inconsistent with the equality provisions of the statute. Therefore the excess of cost to the complainant in manufacturing its products at Pueblo over that of its competitors in other localities [Chicago] by reason of inferiority of its coal and iron ore; the structure or condition of its plant and cost of labor, or other like causes, is not to be considered in ascertaining the rightful relative adjustment of rates from such places.

In Anthony Salt Co., *et al., vs.* The Missouri Pacific Railway Co., *et al.* (5 *I. C. R.*), the commission held that Hutchinson, Kans., salt was denied "the reasonable advantage of its proximity to the market" by a charge of 35 cents per 100 lbs. from respectively Hutchinson to Fort Worth, a distance of 427 miles, and St. Louis to Fort Worth, a distance of 743 miles. The commission held that under these respective charges the railways were violating the law by "hauling Michigan salt a distance of 316 miles without charge." The commission brushed aside as of no consequence the fact that the Michigan salt paid 8 cents per 100 lbs. to reach St. Louis. It is ordered that—

the maximum rate on salt from Hutchinson to Galveston and Texas common points be fixed at 27 cents per 100 lbs. so long as the rate on salt from St. Louis to Texas points is fixed at 35½ cents per 100 lbs., and that the relation and proportion be hereafter maintained between rates on salt from St. Louis and Hutchinson to Texas common points as hereby established.

By this decision and order the Interstate Commerce Commission in effect established a customs barrier of 8 cents per 100 lbs. against Michigan salt which sought a market in Texas. It is instructive, in this connection, to note that the commission itself found that the difference in the cost of production of salt was only 5 cents per 280 lbs. in favor of Michigan.

In 1891 the real-estate operators and the jobbing merchants of Minneapolis, and to some extent the millers of Minneapolis, became alarmed lest Duluth should impair the ascendency of Minneapolis as a milling center and, by reflex action, as a jobbing center, for the farmer tends to buy his supplies where he sells his produce. The Mississippi River no longer furnished all the power needed by the Minneapolis mills, and the cost of coal was $1.50 a ton more in Minneapolis than in Duluth, because the latter city was located directly upon Lake Superior.

The railways of the Northwest, after much warring of rates, had agreed upon a division of the competitive grain traffic between Minneapolis, Duluth, and Milwaukee. That division of the traffic provided, among other things, that from a large territory in North and South Dakota and in Minnesota the rates on wheat should be identical to Minneapolis and to Duluth, though numerous points in the territory in question were from 7 per cent., or 20 miles, to 30 per cent., or 106 miles, nearer to Minneapolis than to Duluth. Of those equal rates the Chamber of Commerce of Minneapolis complained before the Interstate Commerce Commission, alleging that they subjected Minneapolis to undue and unreasonable prejudice and disadvantage. The commission ordered that the rates in question be made to correspond absolutely to the respective distances, that is, that the existing rates to Minneapolis be reduced by from 7 to 30 per cent. (5 *I. C. R.*, The Chamber of Commerce of Minneapolis *vs.* The Great Northern Railway Co., *et al.*).

The doctrine that disputes arising out of the trade jealousies of rival business centers are to be settled by the application of the distance tariff would lead to the readjustment of the entire interstate commerce of the United States, and to the destruction of an enormous percentage of the existing trade relations. To illustrate: The distance from Chicago and Milwaukee to St. Paul is little more than half the distance from St. Louis to St. Paul. Yet the freight rates from St. Louis to St. Paul are only 5 per cent. in excess of the freight rates from Chicago and Milwaukee to St. Paul. On low-grade freight the advantage of Chicago and Milwaukee over St. Louis is less than 1 cent per 100 lbs., "and that is very aggravating to the people interested in shipping from Milwaukee to St. Paul."

To sum up: If the federal government is to be called in to exclude Michigan salt from Texas, or Cincinnati buggies from Augusta, or Pacific coast sugar from the Missouri River Valley, there is no reason why it should not be asked to establish customs barriers generally throughout the United States. There is no reason why it should not exclude New England boots and shoes from the territory "naturally tributary" to Chicago; or Chicago boots and shoes from the territory naturally tributary to St. Louis. Under the application of the spirit of the foregoing decisions, we should soon cease to have a United States, and should have instead an Atlantic seaboard, an Ohio Valley, a Pacific coast, a Michigan, and a Kansas.

The more efficient the railways become, the more do they enable the distant producer to reach the distant consumer. But at the same time they arrest that growth in values, and impair that monopoly of supplying the market, that depend upon an inefficient system of transportation. To illustrate: When the railways became so efficient that the grain of Kansas, Nebraska, Minnesota, and the Dakotas could be carried, not only to the Atlantic seaboard, but even to Europe, the value of land for wheat-raising purposes declined from 25 to 50 per cent. in New York, Pennsylvania, and Ohio. In England, Scotland, and Ireland the aggregate value of the farming land declined from $10,000,000,-

000 in 1874 to $5,000,000,000 in 1894. Again, when the railways became so efficient that milk was carried daily into New York City from points 417 miles distant, the dairy farmers near New York City found that a sharp limit was set, not only to the price of milk, but also to the value of land used for dairy purposes. Still again, when the Mobile & Ohio Railroad opened to truck-farming the belt of land, 272 miles wide, lying between Verona and Mobile, the truck farmers nearer St. Louis found themselves exposed to a very unwelcome competition.

When the grain from west of the Mississippi River was poured into the Atlantic seaboard territory, the farmers of New York, Pennsylvania, and Ohio demanded that the rates on grain from their states and from the trans-Mississippi states, respectively, be adjusted on the basis of relative distances, in order that there might be conserved to New York, Pennsylvania, and Ohio "all the natural advantage of their geographical location as compared with the trans-Mississippi country." But there was at that time no Interstate Commerce Commission to arrest the growth of wheat-raising west of the Mississippi for the purpose of protecting the wheat industry east of the Mississippi. But some fifteen years later, in 1895, there was an Interstate Commerce Commission, and to that body the dairy farmers near New York City appealed successfully for protection against the dairy farmers more distant from New York (*7 I. C. R.*, The Milk Producers' Protective Association *vs.* The Delaware, Lackawanna & Western Railroad Co.). In that case the reasoning by which the commission supported its decision in favor of the near-by farmer, and against the distant one, rested upon the doctrine that the amount of milk offered to New York City's inhabitants must not be allowed to exceed "the natural demand," lest the price of milk become too low; in other words, the commission undertook to fix the price which the people of New York City must pay for milk. The commission held that the dairy farmers upward of 40 miles from New York must not be allowed to meet any of the growing demand of New York for milk until the farmers less than 40 miles away had supplied their natural share of that increased demand; that farmers upward of 100 miles from New York must

not be allowed to come in until after the farmers between 40 miles and 100 miles distant had supplied their natural share; and so on. In this connection it is instructive to note that one reason why the New York dealers in milk did not buy more milk of near-by farmers was that some of the latter persisted in feeding brewery swill to their cows. By implication the commission decided how much milk from cows fed on brewery swill the people of New York must consume before they should have the right to avail themselves of the services of the railways which were ready to bring milk from more distant regions.

In 1897 a market gardener at Verona, 270 miles distant from St. Louis, appealed successfully to the commission for protection against the market gardeners more distant from St. Louis (*7 I. C. R.*, W. R. Rea *vs.* The Mobile & Ohio Railroad Co.).

In 1899, upon the appeal of the Board of Trade of Chicago,[1] the commission undertook to limit the competition between the two groups of railway systems leading from Nebraska and the adjoining states to respectively the Atlantic seaboard ports and the Gulf ports. The commission took that course in order that it might conserve to Illinois "all the natural advantage of her geographical location as compared with the trans-Mississippi country." Precisely in so far as the commission succeeded in that undertaking, it deprived the trans-Mississippi farmer of the lowering in the cost of moving his grain to Liverpool that the competition in question would have produced, had it been left unchecked. In other words, the commission depressed the farm price of grain west of the Mississippi River. Incidentally, the commission also checked the growth of Omaha as a primary grain market, to the advantage of Chicago as a primary grain market. That was the meaning, in plain English, of the policy of conserving to Illinois "all the natural advantage of her geographical location as compared with the trans-Mississippi country."

In the decisions just reviewed the Interstate Commerce Commission undertook to protect certain producers and traders from

[1] 8 *I. C. R.*,. Export Rates from Points East and West of the Mississippi River, and In the Matter of Relative Rates upon Export and Domestic Traffic in Grain and Grain Products, etc.

those destructions and impairments of values, as well as from those changes in the course of trade, which are a necessary incident to the progress and the development of our country. That policy was as indefensible, and as destructive of progress, as would be the policy of legislating against the adoption of labor-saving machinery, lest the use of such machinery should cause the displacement of labor, or compel the labor thus displaced to find new employment. Thus we find that the question whether we shall condemn a rate as unjust, or shall approve it as just, depends upon our attitude to great questions of public policy; questions of which the solution should be left to Congress, and not to an administrative body, such as is the Interstate Commerce Commission.

The competition between the Gulf roads and the Atlantic seaboard roads, as well as the competition between the lake vessels and the Atlantic seaboard roads, is much keener in the carriage of wheat for export than in the carriage of flour for export. For that reason the railway rates on wheat for export often are much lower than the railway rates on flour for export. That fact undoubtedly handicaps the American miller in competing in England with the English miller who grinds American wheat into flour. On the other hand, it benefits the American farmer, partly because every reduction in the cost of carrying his surplus wheat to the European markets raises the farm price of wheat; partly because the market for American wheat in Europe is permanently larger than is the market for American flour. The Interstate Commerce Commission, under the influence of the notion that it was its privilege and its duty to extend the policy of protection to our native industry to the point of promoting the export of our surplus grain in the form of flour, and restricting its export in the form of grain, in August, 1899, ordered that the rate upon grain for export must not fall more than 2 cents per hundred pounds below the rate upon flour for export. The commission assumed that 2 cents per hundred pounds represented the difference in the respective costs of carrying by rail the two articles of wheat and flour, and it undertook to order that the benefit to the

farmer of the fact that the market in Europe for American wheat is permanently larger than the market for American flour, must be limited by the arbitrarily selected standard of the difference in the cost of carrying by rail wheat and flour. It has been well said that until this decision was rendered—

> no one had ever suggested that the decision of such paramount questions of public policy should be delegated to a government bureau. If there is to be any action interfering with the free play of commercial conditions, which now determine the relative advantages of American farmers and American millers, it would seem that that interference ought to be by the direct act of Congress; and that the settlement of the grave questions of public policy involved should not be delegated to an administrative bureau [which shall be at liberty] to enact at its pleasure "protective" legislation.[2]

When the railways leading to Philadelphia, Baltimore, and New Orleans, respectively, resolved to make of those cities great ports of export for wheat and other agricultural products, in competition with the old-established port of New York, their first task was to induce European steamship companies to send vessels regularly to the respective ports of Philadelphia, Baltimore, and New Orleans. Had the steamship companies been obliged to depend for cargoes upon the import trade of Philadelphia proper, or Baltimore proper, or New Orleans proper, they would have been obliged to send their vessels to those ports largely in ballast. That, in turn, would have compelled them to make such high charges for carrying away the grain exported that it would have been difficult for Philadelphia, Baltimore, and New Orleans to compete as ports of export with the old-established port of New York. In order, therefore, that the vessels might come laden to the ports of Philadelphia, Baltimore, and New Orleans, the railways leading to those ports authorized the steamship companies to take cargoes destined from European ports to points anywhere in the United States at any rates that it should be necessary to make in order to meet the competition of the vessels sailing to the port of New York. The railroads in question agreed to carry the freight in question to points in the interior of the United States

[2] *Hearings before the Committee on Interstate Commerce, United States Senate,* May 23, 1905, Mr. Walker D. Hines in rebuttal.

from the ports in question at any rates that it might be necessary to make, regardless of the rates that they might be charging at the time for the carriage of goods of domestic origin from the seaboard area to points in the interior. Thus there came to be a great discrimination in freight charges in favor of commodities imported into the interior on through bills of lading, as against commodities of a similar nature manufactured in the seaboard territory, as well as against commodities imported to an Atlantic seaboard port and subsequently sold and shipped into the interior. The practice unquestionably tends to neutralize in part the effect of the customs duties established by Congress for the protection of our native industries. It tends also to encourage the importation of goods directly to such interior points as Chicago, St. Louis, Kansas City, Omaha, Denver, etc., etc., at the cost of curtailing the business of the importers located in New York, Philadelphia, Baltimore, etc. In short, we have here one of those great conflicts of interest that are unavoidable in the progress and development of our country. If the policy of protection to our native industry is so sacred that we may under no circumstances close our eyes to any modification of it, then the growth of the ports that compete with New York — namely, Boston, Philadelphia, Baltimore, New Orleans, Galveston, Brunswick and Savannah, Ga., Charleston, S. C., Mobile, Ala., etc. — will have to suffer a great check, if not actual destruction. That, in turn, is a matter of vital interest, not only to the ports affected, but also to every farmer. It is the competition of the railways leading to rival ports of export, as well as the competition of the merchants exporting by way of the rival ports of export, that pulls down, not only the railway rates on grain for export, but also the storage and commission charges that can be collected on such grain. Every such reduction in railway rates, storage, and commission charges increases the farm price of grain.

In March, 1889, on the basis of evidence in a case brought before the Interstate Commerce Commission by the seaboard commercial interests, the Interstate Commerce Commission, relying upon the supposed power to fix a railway rate, issued the order that "imported traffic transported to any place in the United

States from a port of entry or place of reception, ... is required to be taken on the inland tariff governing other freights," — that is, freights originating in the Atlantic seaboard territory.

In Texas Pacific Railroad Co. *vs.* Interstate Commerce Commission (*162 U. S. Reports*), the Supreme Court ruled that the foregoing order of the commission was an unlawful order. It then discussed at length the public policy underlying the order, expressing forcefully its dissent from that policy. It said that competent evidence had been adduced before the commission that, if it were definitely determined that the railroads were not at liberty to charge less than the full inland rate on commodities imported to interior points on through bills of lading, the result would be to close every steamship line sailing to and from Philadelphia and Baltimore. It added that "Congress had not seen fit to grant legislative powers to the commission," and that the commission had erred in assuming that it was bound "to so construe the Act to Regulate Commerce as to make it practically co-operate with what is assumed to be the policy of the tariff laws." It said that the general order issued by the commission —

> instead of being a regulation calculated to promote and enforce the express provisions of the act, was itself a law of wide import, destroying some branches of commerce that had long existed, and undertaking to change the laws and customs of transportation in the promotion of what is supposed to be public policy.

Finally, the Supreme Court commented upon the fact that the commission had not taken into consideration all the facts in the case, but had considered the interests of one party only, the complainant. The Supreme Court said:

> It could not be supposed that Congress, in regulating commerce, would intend to forbid or destroy an existing branch of commerce, of value to the common carriers and to the consumers within the United States. Clearly, express language must be used in the act to justify such a supposition. So far from finding such language, we read the act in question to direct the commission, when asked to find a common carrier guilty of disregard of the act, to take into consideration all the facts of a given case, among which are to be considered the welfare and advantage of the common carrier, and of the great body of the citizens of the United States, who constitute the consumers and the recipients of the merchandise carried, and that the attention of the commission is not confined to the advantage of shippers and merchants who deal

at or near the ports of the United States, in articles of domestic production; undoubtedly the latter are likewise entitled to be considered; but we cannot concede that the commission is shut up, by the terms of the act, to solely regard the complaints of one class of the community.

The criticism that the commission had regarded solely the complaints of one class of the community applies to all of the decisions here reviewed. In those decisions the commission judged the facts, not with an open mind, but with a mind influenced by certain peculiar political and economic theories, to wit: that the freedom to trade over the entire area of the United States established by the framers of the Federal Constitution must be abridged; that producers, traders, and real-estate owners must be protected against those changes in property values that are a necessary incident to that widening of the market, and those changes in the course of trade as well as the seats of production, which are produced by the ever-increasing elimination of distance and time through improvements in the means of transportation; and that the policy of protection to our native industries must not only be kept free from any modification whatsoever, but even extended to the point of securing to American manufacturers advantages over European manufacturers in the domestic and native markets of those very European manufacturers.

We must remember that the Interstate Commerce Commission sought to interpret the Act to Regulate Commerce in the light of these political and economic theories, if we would appreciate the tremendous difference between a commission with administrative and judicial powers, and a commission with legislative power. A commission with power merely to condemn an existing rate as unreasonable, but without power to substitute for the future a rate for the one that has been condemned, would have judicial power only. It would, therefore, have to judge a rate complained of on the strength of all the facts, and under the restraint of the established law of our land as well as the spirit of our institutions. On the other hand, a commission with power to do a legislative act — that is, prescribe for the future a railway rate — would have the power to judge a rate complained of in the light of such of the facts as it chose to consider, and to the exclusion of such of

the facts as it chose not to consider. The power to legislate is the power to exercise the legislative discretion, to exclude certain facts from consideration, and to exalt certain other facts. The Federal Constitution limits the legislative power of the Congress only in certain directions. In the field of railway-rate legislation that limitation extends only to the prohibition of giving advantage or preference to a port or ports in one state over the port or ports of another state; and the prohibition of making a rate so low that it will be confiscatory, in that it amounts to the taking of property without due process of law. Those would be the only constitutional limitations upon the commission, or any other tribunal upon which Congress should bestow the legislative power to make a railway rate. Neither one of those limitations would prevent the body endowed with the power to make a railway rate from making into the established law of the land the political and economic theories which the present Interstate Commerce Commission has sought to read into the present Act to Regulate Commerce.

Did space permit, it could easily be shown that the present law is sufficient to afford relief from all evils in the field of railway rates, if one judges the question of the reasonableness and justness of railway rates with a mind free from the peculiar political and economic theories which the Interstate Commerce Commission has espoused. The seemingly harmless and seemingly inconsequential proposal to endow the Interstate Commerce Commission with power to make a rate, therefore, upon examination turns out to be nothing short of a revolutionary proposal. It turns out to be the proposal to establish a bureaucratic body that shall have the power to regulate the interstate commerce of our country according to any political and economic theories that it may chance to espouse. Such a body would have a power over the destinies of our land, such as has been wielded over no land by any government, by any man, or by any body of men.

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